IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

COMPANY APPLICATION No. 255 of 2004

In

COMPANY PETITION No. 119 of 2004

For Approval and Signature:

HONOURABLE MR.JUSTICE JAYANT PATEL

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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M/S.SARIKAPAINTSLTD. - Applicant(s)

Versus

MRS.REETARAJESHSHETH - Respondent(s)

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Appearance :

MS NIYATI K SHAH for Applicant(s) : 1,
MR MANOJ N POPAT for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE JAYANT PATEL

Date : 03/10/2005

ORAL JUDGMENT

1.Heard Mr.D.K. Puj, learned Counsel with Ms.Niyati Shah

for the applicant and Mr.Manoj Popat, learned Counsel for the opponent, for final disposal.

2. Upon hearing the learned Counsel appearing for the parties, it appears that as per the opponent, it has to recover the amount of Rs.14,47,553/- with interest at the rate of 16% per annum. It appears that the opponent served statutory notice upon the applicant Company and thereafter the Company Petition No.119 of 2004 is preferred for winding up of the applicant Company on the ground that it is unable to pay the debts. The main Company Petition No.119 of 2004 for winding up shows that it is alleged by the petitioner therein, who is the opponent herein that certain cheques were also issued and they were dishonoured and the proceedings under Section 138 of the Negotiable Instruments Act were also initiated against the applicant Company by the original petitioner. It is alleged in the Company Petition that the Company has to pay the amount of Rs.18,47,396/- with interest on Rs.14,47,553/- at the rate of 16% per annum. In the said petition, initially this Court (Coram: D.A. Mehta, J.) on 30.4.2004 had passed the order of issuing notice returnable on 6.7.2004. Thereafter, it appears that this Court (Coram: K.A.Puj, J.) on 9.7.2004 had passed

the order on the basis that though the respondent Company therein was already served on 17.5.2004, nobody had appeared on behalf of the respondent Company and in spite one opportunity given, nobody appeared and, therefore, the Court passed the order of admitting the petition and it was observed that the order regarding the advertisement was deferred for the time being and one opportunity is given. It was mentioned that if nobody appears on the next date of hearing, the order regarding the advertisement would be passed and the matter was adjourned to 16.7.2004. It appears that thereafter on 16.7.2004, the order was passed by this Court (Coram: K.A.Puj, J.) of issuing the advertisement in Gujarati daily : Jansatta-Loksatta, and English daily: Indian Express, both Ahmedabad Edition, for fixing the final hearing on 18.8.2004 and the publication in the official gazette was dispensed with.

3.It appears that the applicant herein preferred O.J. Appeal No.33 of 2004 against the very ex-parte order passed by this Court (Coram: K.A. Puj, J.) dated 9.7.2004 and 16.7.2004 and in the said O.J. Appeal on 28.7.2004, the Division Bench of this Court (Coram: B.J. Shethna and M.C. Patel, J.J.) passed the order, whereby the learned Counsel for the applicant Ms.Shah

withdrew the appeal with liberty to approach the learned Company Judge for revocation of the ex-parte order for admission dated 9.7.2004 and for staying the operation of the ex-parte order dated 16.7.2004 for the advertisement in Company Petition No.119 of 2004. The O.J. Appeal was dismissed as withdrawn and the Civil Application in the O.J. Appeal was also dismissed as withdrawn.

4. It appears that thereafter the applicant has preferred the present application for revocation of the order of admission dated 9.7.2004 and of the advertisement dated 16.7.2004 passed in Company Petition No.119 of 2004.

5. It may be stated that normally as per the High Court Rules, the matter would have been gone to the same Bench, however, in view of the order passed by the Hon'ble the Chief Justice on administrative side the matter was earlier assigned to another Bench and this Court (Coram: P.B.Majmudar, J.) had passed the order of admitting the present application and interim stay against publication of the advertisement and now the matter is assigned to this Court as per the order dated 13th September, 2005 passed for hearing.

6. The affidavit in support of the Judge's summons is filed by one Mr.Kantibhai M. Patel, Director of

applicant Company and in the said application it has been, inter alia, stated that the applicant had handed over the papers of the Company Petition No.119 of 2004 to their Advocate Mr.Harshad Trada. However, the said Advocate neither filed the appearance, nor informed the applicant about the subsequent orders. The applicant in the application has also stated regarding the viability of the Unit and the scheme of revival etc., for contending the strong case on merits. However, I find that the said aspects are not required to be considered at this stage, leaving the parties to agitate such aspects in the main Company Petition for winding up as and when it is so considered by this Court.

7. In the present application the aspects which deserve to be considered is the recalling of the ex-parte order passed on 9.7.2004 and on 16.7.2004 for admission of the petition and for publication in the newspaper. The grounds in substance raised on behalf of the applicant is for default by the Advocate, who was engaged for such purpose. It also appears that as per the letter of the said Advocate, who was engaged , his father had met with paralytic attack and, therefore, he was required to be hospitalized and thereafter the father of the Advocate had expired and, therefore, the papers

could not be properly placed through the another Advocate, Shri Yogesh Ravani, who was to appear in the matter through Shri Harshad Trada. The ground on the part of the Advocate appears to be reasonable. However, merely because the Advocate is engaged the litigant is not absolved from the responsibility of taking care of the matter. It is also required for the litigant to enquire about the status of the matter from his lawyer and to take follow-up action. Had the company enquired from her Advocate, it would have been known that the Advocate has not represented the case and, therefore, it cannot be said that there is no default whatsoever on the part of the company in defending the proceedings of the main Company Petition. Therefore, even if it is considered that on account of the default by the Advocate, the party should not suffer, it is not a matter where there is no default whatsoever on the part of the company concerned in defending the proceedings of the Company Petition for winding up.

8. It is well settled that even in the matter where there is a default, the Court while considering the matter for setting aside of the ex-parte order may consider the aspects as to whether the default can be compensated in terms of money by awarding suitable cost

or not. Considering the facts and circumstances, I find that the amount of Rs.5,000/- can be said as suitable compensation to the original petitioner for default caused in not properly defending the proceedings of main company Petition for winding up.

9. The other important aspects which deserve to be considered is for exercise of discretion while setting aside the ex-parte order or while recalling the ex-parte order passed by the Court. Such exercise of discretion may vary from facts to facts, but if the ex-parte order is set aside or recalled without any suitable condition imposed upon the party who did not properly defended the proceedings, the same would encourage the litigant to allow the proceedings to go on ex-parte and thereafter if the adverse order is passed, the application for setting aside of the ex-parte order would be moved and consequently may result into delaying the proceedings of the litigation. The reference may be made to the decision of this Court in **"Kalubhai Dhulabhai Makwana v. State of Gujarat & Anr.", reported in 2002(4) GCD, 3159 (Guj)**. It appears that in the present case as per the original petitioner, the respondent Company had to pay the amount and the cheques were issued for such purpose and some of the cheques had bounced. The case of the

applicant herein is that the Management is changed and the scheme of additional finance and for improving the company is going on. Be that as it may, but it prima facie appears that if the judicial discretion is exercised in the present case without imposition of suitable terms and conditions, the same may result into allowing the parties to take un-due benefits of their own default. I would have recorded further reasons for such purpose , however, Mr.Puj, learned Counsel appearing for the applicant agreed to deposit 30% of the amount of Rs.14,47,553/- by the applicant Company with this Court on or before 31.12.2005 by giving suitable instalments for such purpose as this Court may find it proper. Mr.Manoj Popat, learned Counsel for the opponent/original petitioner of the Company Petition for winding up is also agreeable if such amount is deposited by the applicant Company as it may be directed by this Court and, therefore, I find that in view of the said agreement by both the sides, no further reasons are required to be recorded. Suffice it to say that even if the ex-parte order is to be recalled or set aside, the applicant would be required to deposit 30% of the alleged amount of Rs.14,47,553/- as condition to show bonafide and for seeking prayer from this Court for recalling of the order, which was

passed by the Court due to default on the part of the applicant.

10. In view of the aforesaid order dated 9.7.2004 as well as the order dated 16.7.2004 passed by this Court (Coram: K.A.Puj, J.) both in Company Petition No.119 of 2004 shall stand recalled on condition that:

(a) the applicant pays an amount of Rs.5,000/- to the Opponent by “Account Payee Cheque” on or before 28.10.2005;

(b) the applicant deposits 15% of the amount of Rs.14,47,553/- with this Court on or before 30.11.2005; and

(c) the applicant deposits the remaining 15% of Rs.14,47,553/- with this Court on or before 31.12.2005.

11. After all the conditions are complied with, it would be open to either side to move this Court for listing of the main Company Petition No.119 of 2004 for **admission afresh**.

12. The application is partly allowed to the aforesaid extent.

3.10.2005 **(Jayant Patel, J.)**

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